No. 02-1824

Supreme Court, U.S.
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In The
Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Petitioner,

v.

MICHAEL WAYNE HALEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF ZACHARY W. CARTER, PAUL E. COGGINS, JANICE McKENZIE COLE, TIM CONE, WILLIAM THOMAS DILLARD, VIC FEAZELL, JAMES P. FINSTROM, ODIS R. HILL, ERIC H. HOLDER, JR., TIM JAMES, JAMES E. JOHNSON, B. TODD JONES, HARRY LITMAN, JOHN S. MARTIN, JIM MATTOX, DENISE E. O'DONNELL, JANET F. RENO, JAMES K. ROBINSON, JAMES A. ROLFE, NICHOLAS J. SPAETH, O.G. STANLEY, JOHN K. VAN DE KAMP, ALAN VINEGRAD, MARK WHITE, AND RONALD G. WOODS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly excused a procedural default where the habeas corpus petitioner was actually innocent of being a habitual felony offender under state law.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are current and former law enforcement officials – including former federal and state attorneys general, past and present district attorneys from the State of Texas where this case arose, and former United States Attorneys – who, throughout their years of public service, have regularly confronted the challenges presented by habeas corpus cases, either in litigating the petitions or handling the remanded criminal cases that occasionally resulted. Each understands the need for robust procedural rules that safeguard our criminal justice system from the potentially overwhelming burden of frivolous claims for collateral review that convicted offenders would otherwise raise. Based on their experience, *amici* know that prosecutors best serve and protect the public by focusing their efforts on investigating unsolved crimes and prosecuting unconvicted offenders, and that those tasks are too often hampered by the need to respond to meritless habeas petitions.

Amici also know, however, that procedural default rules are themselves designed to serve justice, and have accordingly been crafted with appropriate exceptions to safeguard against fundamental miscarriages of justice. Prosecutors do not need and should not want any rule that prevents correction of a fundamental injustice like the one in this case. To the contrary, it is critically important to

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. This brief was written by counsel for *amici curiae*. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae* and their letters of consent accompany this brief. The *amici* herein are individually identified in the Appendix.

the success of their mission that prosecutors be seen by all – the victims and witnesses with whom they work, the judges before whom they appear, and the jurors who come to court every day – as serving a system that is committed to justice rather than victory at all costs. The inflexible application of an otherwise reasonable procedural default rule can only undermine that vital interest when it results in the fundamental injustice of subjecting a defendant to over a decade of imprisonment for which he is unquestionably ineligible under state law.

We write to urge the Court to affirm the judgment below because there is no inconsistency in this case between the interest in aggressive, effective law enforcement and the interest in justice. This Court can uphold the result agreed upon by the magistrate judge, the district court, and the court of appeals and still maintain an effective, workable default rule that allows the exceptions that will ultimately enhance prosecutors' effectiveness.

INTRODUCTION AND SUMMARY OF ARGUMENT

Texas has punished respondent for a "second degree felony." Tex. Penal Code Ann. § 12.42(a)(2) (West 2003). It is undisputed that he is factually innocent of that second degree felony. This is not a case about federalism; it is about whether the writ of habeas corpus remains a bulwark against the fundamental injustice of knowingly imprisoning an innocent person.

Respondent stole a calculator from Wal-Mart. Because of his prior theft convictions, respondent's crime in this case was a "state jail felony" punishable by up to two years in state prison. *Id.*, §§ 12.35(a), 31.03(e)(4)(D). He was not punished for this crime, however, but for the aggravated offense of having committed a "state jail felony" as a habitual felon, which is a "second degree felony" punishable by up to 20 years of imprisonment. *Id.*, § 12.42(a)(2).

The habitual offender statute requires a fact not present in this case: that the second of the two predicate prior felonies have been committed after the defendant's conviction of the first. The State of Texas concedes that this element was lacking in respondent's case, but nevertheless seeks to return respondent to prison to serve out the remainder of the 16-and-a-half-year sentence imposed on him as a result of the mistake.

I. Texas and its supporting *amici* incorrectly suggest that this Court can affirm the judgment below only by breaking new ground and creating a vast new exception to procedural default rules that would otherwise bar claims of "actual innocence of sentence" in non-capital cases. To the contrary, allowing respondent to pursue his habeas claim and obtain relief from his illegal sentence is squarely in line with this Court's precedents.

Because respondent is innocent of the sole fact that rendered him statutorily eligible for a ten-fold increase in punishment, this Court's previous decisions allow him to obtain relief notwithstanding his earlier procedural default. Under settled law, procedural default can and should be excused in a habeas case where necessary to avoid a fundamental miscarriage of justice. Such miscarriages of justice can occur when a defendant is convicted of a crime he did not actually commit, *Murray v. Carrier*, 477 U.S. 478 (1986), as well as when a defendant is sentenced to death on the basis of a penalty phase fact-finder's erroneous determination that aggravating circumstances exist. *Sawyer v. Whitley*, 505 U.S. 333 (1992). In developing this concept of "actual innocence," the Court has consistently focused on facts that render a habeas petitioner statutorily eligible for the criminal sentence from which he or she seeks relief. That principle is plainly applicable to respondent's case.

For habeas petitioners challenging criminal sentences, there is no reason to limit the cases applying the actual innocence doctrine to the death penalty context in which they arose. Contrary to Texas's claims, this Court has never endorsed, and has in fact rejected, the idea that capital and non-capital cases should be treated differently with respect to the procedural rules governing habeas claims. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 405 (1993); *Smith v. Murray*, 477 U.S. 527, 538 (1986). Moreover, the analysis the Court employed in *Sawyer v. Whitley* applies with equal force to non-capital sentencing, and in particular to this case. Just as a capital defendant can be considered actually innocent of "aggravated" murder by virtue of the fact that he did not engage in the conduct that renders him death-eligible, respondent must be considered actually innocent of the second-degree felony for which he was sentenced because his prior felony convictions were not committed in the sequence required under Texas law. The exception to procedural default rules that respondent seeks is therefore entirely consistent with this Court's prior decisions regarding both the meaning of "actual innocence" and the relationship between elements of an offense and facts relevant to sentencing. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000).

This logic cannot be defeated by citing the decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), for the proposition that a recidivism-based sentencing enhancement does not create an aggravated offense within the meaning of *Apprendi*. First, to the extent *Almendarez-Torres* so holds, it is no longer good law. *See Apprendi*, 530 U.S. at 489-490; *id.* at 520-521 (Thomas, J., concurring). In addition, and just as important, the fact that Texas now concedes is lacking in respondent's case – the sequence of his prior convictions rather than their existence – is an element of the Texas law that is entirely unrelated to

whatever force the *Almendarez-Torres* recidivism exception ever had. Thus, even if *Almendarez-Torres* remains good law, there is no principled reason to apply it as the basis for denying respondent's claim.

II. Recognizing that respondent's claim is consistent with prior case law does no harm to the important interests of comity and finality. The interest of comity is no more at risk here than it was in the previous "actual innocence" cases that Texas seeks to distinguish. In each, the decision by a federal court to excuse procedural default is warranted because doing so vindicates the State's substantive criminal law. Federal courts no more disparage a State's laws when they allow a claim like respondent's to proceed than they do in allowing the kind of claim that Texas concedes involves "actual innocence."

Allowing respondent's claim to proceed also respects society's interest in the finality of criminal judgments. A decade of experience in the jurisdictions that currently recognize, in non-capital sentencing cases, an actual innocence exception to default rules demonstrates that adopting such a rule at the national level will not burden prosecutors or courts with a rash of meritless claims. On the other hand, if this Court were to crimp the actual innocence rule in the manner Texas urges, it would create a class of cases, however small, in which a fundamental miscarriage of justice would deliberately be allowed to stand uncorrected. Such a result would breed distrust of the criminal justice system, and in particular of prosecutors' role in it. The costs of such distrust would far outweigh the limited costs of allowing the rare habeas petitioner in respondent's circumstances to proceed with an otherwise defaulted claim.

ARGUMENT

I. THE IMPOSITION OF A SENTENCE FOR WHICH A DEFENDANT IS STATUTORILY INELIGIBLE IS A FUNDAMENTAL MISCARRIAGE OF JUSTICE.

A. The Touchstone For The "Actual Innocence" Exception Under *Sawyer v. Whitley* Is Statutory Eligibility For The Sentence Imposed.

This Court has recognized that a federal court may decide a petition for habeas corpus on the merits, even though the prisoner has failed to show cause for, and prejudice from, the procedural default of a constitutional claim, so long as the court's failure to hear the claim would constitute a fundamental miscarriage of justice. *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986); *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The paradigmatic miscarriage of justice is the conviction of a person who is actually innocent of the crime of conviction, but the Court has also reviewed criminal sentences to determine whether imposition of a particular sentence was a fundamental miscarriage of justice. *See Sawyer v. Whitley*, 505 U.S. 333, 340-41 (1992); *Dugger v. Adams*, 489 U.S. 401, 412 n.6 (1989); *Smith v. Murray*, 477 U.S. 527, 537-38 (1986).

Each time the Court has applied the exception in the context of sentencing, it has acknowledged the semantic awkwardness of applying the phrase "actual innocence," but has nevertheless proceeded to determine whether a fundamental miscarriage of justice occurred. Texas and its *amici* rely on the fact that each of these cases is a capital case, from which they conclude that capital cases represent a limited extension of an "actual innocence" exception, beyond the concept's natural boundaries. *See* Pet. Br. at 24-26; U.S. Br. at 14-16; Ill., *et al.* Br. at 11-13. They

thus implicitly argue that cases such as *Sawyer*, *Dugger*, and *Smith*, represent an application of the "death is different" principle. To the contrary, those cases demonstrate that the "actual innocence" exception can and should be consistently applied to any error – whether committed at the guilt or sentencing phase – that wrongly renders a defendant eligible for an increased statutory maximum sentence.

With respect to its habeas jurisprudence, this Court has declined to treat capital and non-capital cases differently. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 405 (*quoting Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (plurality opinion)) ("we have 'refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus' "). *Smith v. Murray* acknowledges this point explicitly. The *Smith* dissent faults the Court for ignoring that "death is a different kind of punishment from any other." 477 U.S. at 545 (Stevens, J. dissenting) (internal quotation omitted). Addressing this argument, the Court responds that the "death is different" principle does not apply in determining whether a petitioner must prove cause and prejudice:

> We reject the suggestion that the principles of *Wainwright v. Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws.

Id. at 538. A fundamental miscarriage of justice requires evidence that constitutional error "undermined the accuracy of the guilt or sentencing determination," the Court explained. 477 U.S. at 539.

In *Sawyer v. Whitley*, the Court reaffirmed that a habeas petitioner can establish actual innocence of a criminal sentence without proving actual innocence of the crime itself, but it set forth a more demanding test for doing so. 505 U.S. at 343-45. *Sawyer* held that establishing actual innocence under a capital sentencing statute

required a petitioner to prove that a "condition of eligibility had not been met," including, for example, that there were no aggravating circumstances. *Id.* at 345. The Court adopted this "eligibility" test as its definition of actual innocence because eligibility relies on "objective factors." *Id.* at 347. A federal district judge can reasonably determine whether a habeas petitioner's evidence negated the existence of an objective fact necessary to render a defendant eligible for the enhanced sentence. *Id.* at 345-46. The Court contrasted the more open-ended, discretionary determination about which sentence to select from among those for which the prisoner was undisputedly eligible, and held that factual errors at that stage of the proceeding did not excuse cause and prejudice. *Id.* at 345-46.

Given the Court's rationale, there is no principled reason to limit *Sawyer* to the death penalty context. The same analysis the Court employed in that case applies with equal force to non-capital sentencing.[2] In essence, there are three determinations that precede the imposition of sentence in any case, capital or otherwise: (1) whether the defendant may be punished at all, *i.e.*, the factual determination as to whether he is guilty of a crime; (2) the statutory maximum sentence for the particular crime of conviction, which can increase if additional facts are found at sentencing; and (3) the discretionary selection of a sentence, from among those for which the prisoner is eligible under the law. Under *Sawyer*, the first two are amenable to "actual innocence" analysis: a mistaken determination leads to a punishment not authorized by

[2] In *Sawyer*, as in *Smith*, it was not the Court, but those who favored a more expansive definition of a "fundamental miscarriage of justice," who argued the qualitative and moral differences between death and non-capital sentencing. *See* 505 U.S. at 361 (Stevens, J. concurring in the judgment).

law, a result that is fundamentally unjust.[3] The third is not subject to such analysis, in that even an incorrect understanding of the facts, while it may affect the sentencer's exercise of discretion, will not result in a sentence greater than the statute allows. The distinction explains, for example, why error relating to mitigating circumstances (which are relevant only to the exercise of discretion in capital cases) was held insufficient to trigger the fundamental miscarriage of justice exception to the procedural default rule in *Sawyer*, 505 U.S. at 345-346.

Thus, the lesson of *Sawyer* is that where, in the absence of constitutional error, no reasonable jury would have found a sentencing fact (including any aggravating circumstance) to be true, a habeas petitioner is "actually innocent" of that sentencing fact and of the enhanced sentence imposed as a result of it. 505 U.S. at 347. Here, because no reasonable jury would – or even could – have found that respondent met the requirements of Texas's habitual felony offender statute, respondent is actually innocent of being a habitual felony offender and of the 16-and-a-half-year sentence imposed. Had he not been falsely identified as a habitual offender, he would not have been eligible for this sentence. Accordingly failure to consider his constitutional claim of insufficient evidence would constitute a fundamental miscarriage of justice.

In short, although the State of Texas and its *amici* attempt to rely on the principle that "death is different" to limit *Smith* and *Sawyer* (*see, e.g.*, *Amicus* Br. of State of

[3] *Cf. Sawyer*, 505 U.S. at 345 ("Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met.").

Illinois, *et al.* at 14), the Court has declined to apply this concept in defining a fundamental miscarriage of justice. It has consistently refused to distinguish in its habeas jurisprudence between death penalty cases and non-capital sentencing. And it has analyzed actual innocence of a criminal sentence in a way that applies equally to capital and non-capital sentencing. Because respondent is not eligible under Texas law for the 16-and-a-half-year term to which he was sentenced, a fundamental miscarriage of justice has occurred.[4]

[4] In making this argument, we do not question the validity of the "death is different" jurisprudence that the Court has developed with respect to the substantive and procedural safeguards that the Constitution requires before a death sentence may be imposed. We merely note that the Court itself has never relied on that jurisprudence to distinguish capital cases from non-capital ones with respect to procedural default rules on habeas review.

Moreover, such a distinction would not accord with the rationale for the "death is different" case law. One of the primary reasons that death is a qualitatively different punishment from all others is that it is irremediable. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J. concurring); *id.* at 345-46 (Marshall, J. concurring). By contrast, the erroneous imposition of a non-capital sentence is not inherently irremediable – but the application of a procedural default rule can make it so. In other words, death is *not* different with respect to the rule at issue here. What sets death apart from other punishments is precisely what the "actual innocence" rule is designed to guard against: the risk that a fundamental miscarriage of justice will stand uncorrected. Viewed in that light, the only pertinent difference that remains between this case and cases such as *Sawyer*, *Dugger*, and *Smith* is the difference between two injustices; one – executing an innocent person – is admittedly worse than the other, but both are untenable under our nation's system of justice. Texas's insistence on such a distinction in the name of comity and finality reduces, ultimately, to nothing more than "a fear of too much justice." *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

B. Where A Prisoner Shows Actual Innocence Of A Fact Used To Increase The Statutory Maximum Penalty, The Miscarriage Of Justice Exception Applies.

Amici in support of Texas attempt to avoid the clear teaching of *Sawyer v. Whitley* and its antecedents by radically reinterpreting those cases. Their startling conclusion is that "this Court has never held that 'actual innocence' of a sentence can excuse . . . procedural default." (Ill., *et al.* Br. at 7; *accord* U.S. Br. at 26.) As reinterpreted by *amici*, *Smith* and *Sawyer* do not allow for proof of actual innocence of a capital sentence, but are "best understood as involving actual innocence of an aggravated offense." (U.S. Br. at 26; *accord* Ill., *et al.* Br. at 9.)

The problem with this argument is that it stops short. If actual innocence of a capital sentence is best understood as actual innocence of an aggravated offense – namely, murder plus aggravating circumstances – then the Court should apply the same reasoning to respondent's conviction as well. Under such analysis, respondent's imprisonment for more than 16 years can only be understood as the result of his conviction for the aggravated offense of theft by a habitual felony offender. Yet respondent is "actually innocent" of this aggravated offense. Thus, even under the analysis favored by *amici*, a fundamental miscarriage of justice has occurred.

1. Under *Apprendi*, Respondent's Sentencing Under The Habitual Felony Offender Law Is Equivalent To A Conviction For An Aggravated Offense.

The United States and certain states as *amici* supporting Texas claim to find support for their argument in the line of cases exemplified by *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The question in *Apprendi* was

whether the Constitution requires a factual determination to be made by a jury on proof beyond a reasonable doubt, if the result of that fact is to increase the statutory maximum possible prison sentence a defendant may receive. 530 U.S. at 469. In New Jersey, the statutory maximum the state could impose for illegal possession of a firearm doubled, from 10 to 20 years, as a result of a judicial finding under the state's hate-crime statute that the defendant committed the crime with racial intimidation as his purpose. *Id.* at 468-69. The state court treated this hate-crime finding as a "sentencing factor" rather than an element of a criminal offense and allowed a judge to determine it. *Id.* at 471-72. This Court concluded, however, that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494. If so, "it is the functional equivalent of an element of a greater offense," and must be found by the jury beyond a reasonable doubt. *Id.* at 490, 494 n.19.

In this case, the finding that respondent was a habitual felony offender is the functional equivalent of an element of a greater offense. It mistakenly renders respondent guilty of a crime that might be called "felony theft by a habitual offender." Had the jury understood that respondent did not have a criminal history sufficient to qualify him as a habitual offender under Texas law, he could have been convicted only of the lesser "state jail felony," and he could have been imprisoned for not more than two years. J.A. 8-9; *see* Tex. Penal Code Ann. §§ 12.35(a), 31.03(e)(4)(D) (West 2003). Because he was incorrectly found to have been a habitual felony offender, he was "punished for a second-degree felony" instead. Tex. Penal Code Ann. § 12.42(a)(2) (West 2003). The statutory minimum sentence for a second-degree felony is 2 years; the maximum is 20 years. *Id.* § 12.33(a). Respondent

received a 16-and-a-half-year sentence, which was within the range of the greater offense only. This is an offense that even the State of Texas concedes respondent did not commit. J.A. 33-34. Thus, respondent is actually innocent of the offense for which he was sentenced, just as a capital defendant may be said to be innocent of the offense of first degree murder plus aggravating circumstances. In both cases, a fundamental miscarriage of justice occurs.

2. The United States Concedes The Injustice Of A Sentence For Which The Recipient Is Statutorily Ineligible, But Mistakenly Exempts Respondent's Case From This Rule On The Grounds That His Sentence Was Enhanced For Recidivism.

The United States, as *amicus*, concedes that the actual innocence exception applies in most cases where the defendant's eligibility for a higher statutory maximum sentence is based on an incorrect factual determination, but it carves out a narrow exception to that rule that would deny respondent relief in this case. The Solicitor General's brief states:

> the actual innocence exception would appear already to apply to facts *other than recidivism* that increase the statutory maximum sentence. Such facts are elements of an aggravated substantive offense – either because the legislature has designated them as offense elements or because the Constitution requires that they be treated that way.

U.S. Br. at 21 (emphasis added).

This application of *Apprendi* is correct, as far as it goes. Suppose respondent's conviction had been for burglary, and the reason his sentence was increased from a statutory maximum of two years to over 16 years was,

rather than the existence of prior convictions, a finding that the burglary had been committed at night. Suppose further that respondent had subsequently proven that he committed the burglary during the daytime. If a finding that the crime was committed at night would have increased his exposure from two to 20 years of imprisonment, *Apprendi* requires that it be treated as the functional equivalent of an element. Had this been the case, the United States acknowledges that respondent would have established actual innocence of the sentence he received. The United States thus concedes that normally the imposition of a non-capital sentence for which a defendant is statutorily ineligible is a fundamental miscarriage of justice.

The problem lies in the attempt to exempt from this analysis recidivism cases in general, and respondent's case in particular. As explained below, the continued reliance by the United States on the precedent of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), is misplaced given subsequent decisions by this Court. But even if *Almendarez-Torres* remains good law, it is inapposite to this case because respondent's sentence was not enhanced simply on the basis of his convictions for prior felony offenses, but also on the basis of the sequence of those prior convictions – an enhancement not within the scope of the rule of *Almendarez-Torres*.

a. The Rule Of *Almendarez-Torres* Has Effectively Been Abandoned.

The United States argues that recidivism should be treated differently because this Court explicitly limited its holding in *Apprendi* to factors other than recidivism. U.S.

Br. at 22.[5] That argument ignores the vestigial nature of the exception for recidivism in *Apprendi*. Two terms before deciding *Apprendi*, this Court had given a different answer to a similar question, in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *Almendarez-Torres* held that the Constitution does not require an allegation of recidivism to be treated as an element of an offense, even when its proof increases the statutory maximum sentence for which a defendant is eligible. *Id.* at 239. Almendarez-Torres's challenge was unusual, in that he admitted his recidivism when pleading guilty to the charged offense, but subsequently argued constitutional error in its omission from the indictment. *Id.* at 227; *Apprendi*, 530 U.S. at 488. The Court was closely divided in rejecting his challenge, with four Justices in dissent. Justice Thomas, who voted with the majority in *Almendarez-Torres*, has since acknowledged the decision as "an error." *Apprendi*, 530 U.S. at 520 (Thomas, J. concurring). Concurring in *Apprendi*, Justice Thomas set forth a thorough rationale for treating as an element of the offense every fact that is by law a basis for imposing or increasing the statutorily authorized punishment, including the fact of a prior conviction. *Id.* at 501.

The Court's opinion in *Apprendi* comes close to acknowledging a proposition the United States deflects, that *Almendarez-Torres* is no longer good law. *Apprendi* did not explicitly overrule *Almendarez-Torres*, as Apprendi had not contested the validity of the earlier case. *Id.* at 489-90.

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[5] That the Solicitor General should propose such an exception is itself odd, given that his brief argues there is no principled basis for distinguishing between sentencing enhancements based on the fact of a prior conviction and those based on other kinds of facts. U.S. Br. at 19-20.

But the Court cautioned, "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Id.* Justice Thomas's concurring opinion goes further, leaving little doubt that an exception for recidivism does not command the support of a majority on the Court. 530 U.S. at 520-21 (Thomas, J. concurring). In subsequent cases, the Court has applied *Apprendi* several times, but has not had occasion to provide *Almendarez-Torres* a respectable burial. *See, e.g., Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003); *Ring v. Arizona*, 536 U.S. 584 (2002). In rejecting the argument of the United States in this case, the Court should now overrule *Almendarez-Torres*, or limit it to its facts. *See* 530 U.S. at 490.

Even if *Almendarez-Torres* were to survive, this Court should not import the distinction to which it gave rise (between the fact of a prior conviction and any other fact used to extend the statutorily authorized maximum sentence) into its habeas jurisprudence. *Apprendi* distinguished, rather than overruled, *Almendarez-Torres* in part because, in the context of those cases, the Court saw a vast difference between the fact of a prior conviction and other sentencing facts. *Id.* at 496. A prior conviction is uniquely the result of an earlier proceeding in which the defendant enjoyed full constitutional protections, including the requirement of proof beyond a reasonable doubt to a jury, and the Court relied on these previously provided protections to mitigate the Sixth Amendment and due process concerns that otherwise dictated its decision in *Apprendi*. *See id.* at 488. Yet the premise of an actual innocence claim is that fact-finding in the instant trial court went awry. Where faulty fact-finding can be shown, it is no answer to point to the procedural safeguards in place to guard against it. If *Almendarez-Torres* retains any precedential value, it must not be extended to prevent habeas petitioners from having their constitutional claims heard

on the merits, where they can prove that they are actually innocent of the sentence imposed on them.

b. Even If *Almendarez-Torres* Remains Good Law And Limits The Definition Of "Actual Innocence," It Does Not Apply Here Because The Essential Element Of Which Respondent Is Actually Innocent Is The Sequence Of His Prior Convictions, Not Their Validity.

The Solicitor General elides an important distinction between two different aspects of the habitual felony offender statute that has been applied in respondent's case: the existence of the two prior felony convictions and their timing relative to each other. He relies on *Almendarez-Torres* for the general proposition that "facts concerning recidivism remain sentencing factors and need not be made elements even if they raise the statutory maximum." (U.S. Br. at 8). But in doing so, the United States strays from the rationale under which this Court squared its decision in *Apprendi* with the rule of *Almendarez-Torres* – a rationale that other *amici* have acknowledged in their brief. As the Court explained in *Apprendi*:

> Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range.

530 U.S. at 488 (cited in *amici* Br. of State of Illinois, *et al.* at 10).

Here, of course, the erroneous "fact" that has increased respondent's sentence – namely, the proposition

that respondent's prior felony offenses were committed in a particular order – is one that was never accorded procedural safeguards prior to respondent's conviction below. Indeed, it is not only challenged as inaccurate, it is indisputably so. In other words, if respondent's complaint was that he was factually innocent of one of the prior felonies, then his claim would rise no higher than Almendarez-Torres's claim, because he would have had constitutionally adequate procedures available to raise such a claim long before that felony conviction served to increase his sentence in the instant case. But that is not respondent's claim. His claim is one that he could not have vindicated before the instant case because it was never previously relevant to his punishment: it is a claim that although he was guilty of each of two prior felony offenses, he is innocent of the separate allegation that he committed those crimes in a sequence that renders his subsequent theft of a calculator a second degree felony.

The two elements of the habitual felony offender statute under which respondent was punished are conceptually distinct. One element, as to which respondent raises no claim of actual innocence, is the requirement of convictions for two prior felony offenses. The second, at issue in this case, is the sequence in which those offenses were committed. Specifically, the pertinent provision of Texas law allows the 20-year maximum sentence to which respondent was exposed to be imposed only where the defendant committed a second prior felony offense after having been convicted of the first. Tex. Penal Code Ann. § 12.42(a)(2) (West 2003). As in many other recidivism-based sentence enhancement laws, this "sequence" element identifies as more serious offenders not just anyone who has committed multiple felonies in the past, but those who have done so in a way that signals a resistance to rehabilitation. The offender who commits a second crime after being sentenced for the first and being confronted

with the consequences of his misconduct is plainly a greater risk to society than one who commits two crimes before being sentenced. A legislature can take such a difference into account in crafting its habitual felony offender laws, and in doing so it creates an element of an aggravated offense that is very different from the simple recidivism enhancement that passed constitutional muster in *Almendarez-Torres*.[6]

In short, even if *Almendarez-Torres* remains good law and serves to limit the definition of "actual innocence," it cannot justify the exclusion of respondent's case from the rule the Solicitor General concedes applies. That rule would apply the actual innocence exception to any claim of innocence with respect to a fact that would trigger the rule of *Apprendi*. Because the "sequence" element of the Texas habitual felony offender statute is not the kind of pure recidivism-based enhancement that the *Apprendi* court left in place, respondent's sentence must be considered the result of an aggravated offense of which he is actually innocent. For that reason, his procedural default can properly be excused under this Court's long-standing precedent.

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[6] The Texas legislature has created just such a statutory scheme, and Texas courts have recognized the sequence element as essential to eligibility for the higher maximum sentence. *See e.g.*, *Tomlin v. Texas*, 722 S.W.2d 702, 705 (Tex. Crim. App. 1987); *Armendariz v. Texas*, 294 S.W.2d 98, 99 (Tex. Crim. App. 1956).

II. SOCIETY'S INTEREST IN EFFECTIVE LAW ENFORCEMENT IS BEST SERVED BY ALLOWING THE CORRECTION OF A FUNDAMENTAL MISCARRIAGE OF JUSTICE IN A CASE SUCH AS THIS.

As demonstrated above, allowing respondent to pursue his claim notwithstanding his earlier procedural default falls squarely within this Court's previous decisions regarding the scope of the actual innocence exception. But even if the decisions by the magistrate judge, the district judge, and the court of appeals to apply the actual innocence exception in this case could properly be viewed as an extension of prior case law, it is an extension that is both warranted in the interest of justice and fully consistent with society's legitimate interests in comity, finality and effective law enforcement. Those interests are of course always at stake when the Court considers exceptions to procedural default rules. But as the Solicitor General has acknowledged, "application of the actual innocence exception to aggravated offenses does not upset the balance between the societal interests in finality, comity, and conservation of judicial resources and the individual interest in protection from fundamental unfairness embodied by the exception." U.S. Br. at 22.

Just as each of those interests can properly be balanced against the need to guard against fundamental injustice in the context of someone who did not commit any crime, or who is innocent of facts that support a non-recidivism-based sentencing enhancement beyond the statutory maximum, so too can each be considered here – not as a trump card that moots any consideration of fundamental fairness, but as one interest among several that must be weighed in vindicating society's interest in robust law enforcement. As this Court has previously noted, "'"[i]n appropriate cases" the principles of comity

and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamentally unjust incarceration."'" *Smith v. Murray*, 477 U.S. at 537 (quoting *Carrier*, 477 U.S. at 495).

A. Allowing An Exception To Procedural Default Rules In Respondent's Case Respects The Interest Of Comity.

As Texas frames the issue, the Court should be reluctant to apply its "actual innocence" jurisprudence in part because doing so "carries the added affront to the States' position in the federal system." Pet. Br. at 13. The State goes on to explain, "'Our federal system recognizes the independent power of a State to articulate societal norms through criminal law.' . . . The power of a State to pass laws means little, however, if the State cannot enforce them." *Id.* (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)). Finally, Texas notes that federal intervention in criminal cases can "'frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" Pet. Br. at 14 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)).

This articulation of the comity interest highlights why it is simply not at risk in this case – just as it is not at risk in the kinds of cases that Texas and its supporters would describe as "true" actual innocence cases. Texas does indeed have the right and the duty to enact substantive criminal laws that reflect the societal norms its citizens endorse, and it has done so here. It has written laws that prescribe a maximum punishment of two years imprisonment for anyone who has done what respondent has done: steal a calculator after having committed prior nonsequential offenses. If respondent could prove he was innocent of stealing the calculator, the State of Texas could not reasonably claim that allowing his otherwise defaulted

claim to proceed was an intolerable affront to its dignity. Federal courts no more disparage the State's interest in punishing offenders or respecting its laws when they allow a claim like the one respondent raises than they do in allowing the kind of claim Texas concedes squarely presents the issue of "actual innocence."

The comity interest is a wash in this case: no matter how federal courts resolve respondent's claim, they will inevitably vindicate one important state interest and override another. When a defendant is given a sentence for which he is ineligible under substantive state law but the state courts are unwilling to provide a remedy, federal courts confronted with a habeas petition cannot escape some comity-based criticism no matter how they rule. If they correct the substantive error, they overrule the state court's resolution of the case. But if they defer to the state court, they frustrate the clear intent of the state legislature in passing the substantive law. This Court's earlier decision to allow an actual innocence exception to procedural default rules in other contexts – where the claim is either innocence of the crime of conviction or of an aggravating circumstance or other statutory eligibility requirement a capital case – plainly show how those competing concerns should be balanced here.

B. Allowing An Exception To Procedural Default Rules In This Case Accords A Proper Respect For The Interest Of Finality.

Texas further suggests that granting respondent the relief he seeks here would represent a "[l]iberal use of the writ" which improperly "breeds disrespect for the finality of convictions and 'disparages the entire criminal justice system.'" Pet. Br. at 13 (quoting *McCleskey v. Zant*, 499 U.S. at 492). In particular, the State worries, somewhat counter-intuitively, that using the writ so readily might

actually encourage future defendants in respondent's position to "sandbag" state courts by "withhold[ing] claims for manipulative purposes." *Id.*

This concern is misplaced for at least three reasons. First, as experience has shown, the limited rule we propose will allow only a very few cases to proceed despite a procedural default. Second, we recognize, based on our experience as prosecutors, that the criminal justice system is far more seriously disparaged when it is susceptible to being perceived as a trap for the unwary rather than an instrument of justice.

Finally, even if such "sandbagging" is a valid concern in other contexts, Texas does not and cannot explain why future defendants faced with an indictment alleging predicate sequential felonies will withhold the fact that they were not actually sequential. Such defendants, like defendants who are actually innocent of the underlying criminal offense, would have nothing to gain and much to lose by intentionally sitting on such claims until the habeas stage, regardless of the outcome of this case. At a minimum, they would risk spending at least some time in needless incarceration while the claim worked its way through the courts. Ascribing such interests to future defendants would be as unjustified as inferring from the record in this case that the prosecutors who introduced the evidence of respondent's prior convictions were aware of the fact that they did not satisfy the substantive statutory requirement and simply counted on that fact escaping notice until it would be too late for respondent or the courts to correct the injustice.

1. Allowing An Actual Innocence Exception In A Case Like This Will Not Produce A Rash Of New And Meritless Claims.

In assessing the cost to the criminal justice system of granting respondent relief, the Court must be clear about

the limits of the rule we advocate today. We urge the Court to recognize only that the factually false determination that respondent was a habitual felony offender, as Texas law defines that term, resulted in a ten-fold increase in the statutory maximum term for which respondent was eligible. Respondent is "actually innocent" of the sole fact that triggered the increase in the statutory maximum sentence, and it is that fundamental miscarriage of justice that we ask the Court to correct. We do not advocate a rule that would allow a habeas petitioner in a jurisdiction employing guidelines sentencing to challenge as a fundamental miscarriage of justice a sentence *within* the prescribed statutory range.[7] That question is best left for another day, because here the facts fit a much more compelling pattern.

This Court has already decided that allowing defaulted habeas claims to proceed in cases where the

[7] The lower courts have not consistently analyzed the issue of whether a petitioner can mount such a challenge by proving that he or she is actually innocent of a fact used to increase the applicable sentencing guidelines range. *Compare, e.g., United States v. Maybeck*, 23 F.3d 888 (4th Cir. 1994), *with Poindexter v. Nash*, 333 F.3d 372 (2d Cir. 2003). Regardless of how that matter is ultimately decided, for purposes of this case it is sufficient to note that allowing an "actual innocence" exception with respect to facts that trigger eligibility for an increased statutory maximum sentence need not entail a similar exception with respect to guidelines calculations or mandatory minimum sentences, just as the result in *Apprendi* did not necessarily entail a rule that a fact triggering a mandatory minimum sentence must be treated as the functional equivalent of an element of the offense. *See Harris v. United States*, 536 U.S. 545 (2002). Accordingly, the rule we propose does not and need not affect the hundreds of cases each year to which the Solicitor General refers in which federal defendants challenge such factual matters as the weight of drugs or their role in the offense of conviction. *See* U.S. Br. at 18-19.

petitioner can demonstrate actual innocence of the underlying crime, or of an aggravating circumstance in a capital case, does not unduly harm society's interest in finality. The same is demonstrably true with respect to the class of claims – actual innocence of a fact that increases the statutory maximum sentence – represented by respondent's habeas petition. This is so even if the Court does not craft a recidivism-based exception into its definition of actual innocence, as the United States urges. Although the Solicitor General points out that many jurisdictions extend criminal sentences for repeat offenders (*see* U.S. Br. at 23-24 & n.6), the relevant inquiry is not the frequency with which recidivism enhancements are imposed, but how often they are challenged on the basis of actual innocence.

The experience in those circuits that have allowed such challenges is encouraging – as might be expected from the failure by Texas and its supporters to marshal more than a handful of case citations from the last decade in support of their concerns about the likely burden of a rule that permits respondent's claim to proceed.[8] The

[8] *See* Pet. Br. at 28-30 (citing *Embrey v. Hershberger*, 131 F.3d 739 (8th Cir. 1997) (en banc); *United States v. Richards*, 5 F.3d 1368 (10th Cir. 1993); *Reid v. Oklahoma*, 101 F.3d 628 (10th Cir. 1996), *cert. denied*, 520 U.S. 1217 (1997); *Sones v. Hargett*, 61 F.3d 410 (5th Cir. 1995); and *Pilchack v. Camper*, 935 F.2d 145 (8th Cir. 1991)). Moreover, the cases Texas cites in its parade of horribles would not, in any event, pass muster under the rule we advocate. The petitioner in *Embrey* raised a purely legal claim and did not assert actual innocence of any fact that increased his statutory maximum sentence. *Richards* likewise involved a purely legal question regarding what can be counted in determining weight of amphetamines for purposes of calculating the applicable sentencing guidelines in a federal narcotics case; and as noted above (note 7), the rule we advocate need not implicate guideline sentences within the statutory maximum. And in *Reid*, *Sones*, and *Pilchak*, the petitioners' belated claims were explicitly addressed to the procedures used to secure the earlier convictions on which their later

(Continued on following page)

Second, Fourth, Fifth, and Seventh Circuits all currently have, or have had, a rule allowing a showing of actual innocence of a non-capital sentence to excuse a habeas petitioner from showing cause and prejudice.[9] Although some of those rules are broader than the one advocated here, none has opened the floodgates to new cases. For example, in the decade since the Fourth Circuit expressly allowed such claims, *United States v. Maybeck*, 23 F.3d 888 (4th Cir. 1994), district courts have published only four opinions adjudicating "actual innocence" of a non-capital sentence. Two of these cases involved misapplication of the federal sentencing guidelines,[10] and are thus not directly implicated by the rule we urge. The other two involved federal defendants who received prison sentences for which they were statutorily ineligible, and these petitioners received relief as a result of their habeas petitions.[11] District courts in circuits other than the Fourth Circuit produced even fewer published cases confronting these actual innocence claims. Clearly, there will be no deluge of cases from this Court's acknowledging that *Sawyer v. Whitley* applies in non-capital cases.

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sentences were enhanced; they were not based on actual innocence of those earlier crimes and therefore could not properly be viewed as claims of actual innocence of the subsequent enhancement.

[9] See *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162 (2nd Cir. 2000); *United States v. Maybeck*, 23 F.3d 888 (4th Cir. 1994); *Smith v. Collins*, 977 F.2d 951 (5th Cir. 1992), *cert. denied*, 510 U.S. 829 (1993); *Mills v. Jordan*, 979 F.2d 1273 (7th Cir. 1992); *but see Hope v. United States*, 108 F.3d 119 (7th Cir. 1997) (no longer allowing such claims).

[10] *See Alston v. United States*, 235 F. Supp. 2d 477 (D. S.C. 2002); *Berger v. United States*, 867 F. Supp. 424 (S.D. W.Va. 1994).

[11] *United States v. Payne*, 990 F. Supp. 412 (D. Md. 1998); *Mobley v. United States*, 974 F. Supp. 553 (E.D. Va. 1997).

Similarly, the rule we propose would not, as the State of Texas fears, be so expansive as to undermine "the integrity of the cause and prejudice test." Pet. Br. at 33. For example, if the Court were to hold, as it has in the context of actual innocence claims relating to capital sentencing, that a habeas petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible" for the enhanced sentence, *Sawyer*, 505 U.S. at 336, the standard for showing the likelihood of a different outcome, but for the challenged error, would be higher than it is under the usual cause-and-prejudice rule. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 695 (1984) (describing the prejudice standard as "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").[12]

Further, unlike a rule allowing exceptions to default in other contexts of habeas review, applying the actual innocence rule here would not entail the burden of retrying a guilty defendant or even reconvening the factual penalty phase proceeding that established his eligibility for the enhanced sentence. If the defendant prevailed in establishing actual innocence, such a proceeding would be unnecessary; the defendant would simply be resentenced

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[12] Even the more lenient "probably" standard this Court has applied to actual innocence claims attacking the underlying criminal charge, *see Murray v. Carrier*, 477 U.S. 478, 496 (1986) (requiring a showing that "a constitutional violation has probably resulted in the conviction of one who is actually innocent") requires a more compelling showing than *Strickland*'s cause-and-prejudice standard. Accordingly, the Court need not decide in this case whether the proper standard applicable to an actual innocence claim such as respondent's is the "clear and convincing" test under *Sawyer* or a more lenient preponderance test. *See Schlup v. Delo*, 513 U.S. 298, 332-33 (1995) (O'Connor, J. concurring).

to a term within the non-enhanced statutory range. If the defendant failed to establish actual innocence of the fact that resulted in eligibility for the longer sentence, no further proceedings at all would be required. In either case, the burden on prosecutors and courts would be minimal.

2. Allowing An Exception To Procedural Default Rules In This Case Enhances Public Confidence In The Criminal Justice System And The Role Of Prosecutors.

It is of course a truism that the prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . . But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). Less often cited from *Berger* is the sentence that immediately follows that passage: "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed." *Id.*

Prosecutors have a vital interest in maintaining that confidence. Public confidence in their commitment to fairness rather than victory greatly helps prosecutors to succeed in their mission. And as prosecutors in jurisdictions that have weathered scandals involving police and prosecutorial misconduct know all too well, the loss of that

confidence can make it unduly difficult to win convictions in even the strongest of cases.[13]

The brief submitted by the State of Texas parses respondent's conceded innocence in a manner that would squander that confidence and bolster instead a crippling skepticism among the prospective jurors whom prosecutors encounter every day. For example, Texas asserts flatly that respondent "is not 'actually innocent'" and belittles the claim before this Court by conceding only that "his second felony was committed three days too early." Pet. Br. at 22. The State goes on in a similar vein to describe as a mere "legal technicality that the dates are three days off." But the dates are not merely "off," and respondent's innocence is no more a "technicality" than that of any person who is immune from a term of imprisonment by virtue of the fact that he has not engaged in the proscribed conduct that is punishable with such a term. The citizens of Texas have made a considered decision that those who meet the specific standards of its habitual felony offender statute – and only those who meet such standards – may be punished far more severely than those who commit a theft under the circumstances of this case.

Respondent's opponents have a quarrel that is more properly addressed to the state legislature that did not

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[13] A scandal need not involve wrongdoing by prosecutors themselves in order to adversely affect their ability to secure convictions. *See, e.g.*, Alan Bernstein, *Lawyers adapt to jurors' doubts on lab evidence*, Houston Chronicle, Nov. 16, 2003, at 37 (reporting problems encountered by prosecutors following controversy regarding police department laboratory's handling of evidence; local "jurors more than ever are skeptical of law enforcement testimony in general, and prosecutors are offering more lenient plea bargains to accused criminals if DNA or certain other laboratory evidence is a pivotal part of their case").

prescribe – or even permit – the sentence they would prefer for someone who has acted as respondent has. By treating respondent's actual innocence as an inconvenient technicality to be evaded so as to keep him incarcerated longer than the law allows, Texas risks sending the wrong signal to the jurors, witnesses, victims, attorneys and judges with whom its prosecutors must interact on a daily basis. The State's position sends the message that prosecutors are willing to ignore legal niceties in order to achieve their own vision of rough justice – a vision that the law of the State demonstrably does not endorse. Such a message both reflects and breeds a cynicism that prosecutors can ill afford in the performance of their already difficult duties. In contrast, by allowing claims such as respondent's to proceed, thereby showing their commitment to the rule of law, prosecutors can reinforce the critically important "confidence that [their] obligations . . . will be faithfully observed." *Berger*, 295 U.S. at 88.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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